SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 594

ARTHUR LEVIN,

Petitioner,

v.

STATE OF MARYLAND,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

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OPINION

The opinion of the Court of Special Appeals of Maryland is reported in 246 Md. 139. The Petition for Writ of Certiorari in the Court of Appeals of Maryland, was denied by Order of the said Court signed by Chief Judge Hall Hammond on June 13, 1967.

JURISDICTION

The mandate of the Court of Special Appeals of Maryland was filed on May 10, 1967, shown in the transcript of record, and the opinion of the Court was filed on the same date, a copy of which is set forth in the Appendix, page 11. The Petition for Writ of Certiorari to the Court of Appeals of Maryland and the Order of the Court of Appeals of

Maryland denying same dated June 13, 1967 is also set forth in the Appendix, pages 17 and 20 respectively. The jurisdiction of this Court is invoked under the Provisions of Title 28, United States Code, Section 1257 (3).

QUESTIONS PRESENTED

1. Is the Law of the State of Maryland as codified in Article 27, Section 418 of the Annotated Code of Maryland, (1957 Edition), constitutional?

2. Are the photographs or pictures in question, obscene, as defined by this Honorable Court?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Amendment One of the Constitution of the United States, reads in part as follows:

> "Congress shall make no laws * * * abridging the freedom of speech, or of the press; * * *".

Amendment Fourteen of the Constitution of the United States, reads in part as follows:

> "* * * No State shall make or enforce any law that shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life; liberty, or property, without due process of law; * * *"

Article 27, Section 418, Code of Public General Laws of Maryland (1957 Edition), reads as follows:

> "§ 418. Sale, exhibition, etc., of lewd, obscene or indecent books, pamphlets, drawings, etc.
>
> (a) Offense Defined. — If any person shall knowingly bring or cause to be brought into this State for exhibition, or sale, or shall sell, rent, or give away or offer to give away, or show or have in his or her possession with intent to sell or give away or to exhibit, show,

advertise or otherwise offer for loan, gift, sale or distribution any lewd, obscene or indecent book, magazine, pamphlet, newspaper, story paper, writing paper, picture, card, drawing or photograph, or any article or instrument of indecent or immoral use, or shall design, copy, draw, photograph, print, utter, publish or prepare such book, picture, card, drawing or paper or other article, or shall write or print or cause to be written or printed any circular, advertisement or notice of any kind, or giving information orally, stating when, where, how or of whom or by what means such a lewd, indecent, or obscene article or thing can be purchased, seen or obtained, shall in every such case be guilty of a misdemeanor and upon conviction thereof shall be punished by a fine not exceeding $200.00 or shall be imprisoned not exceeding one year, or be both fined and imprisoned in the discretion of the Court; provided, that this section shall not apply to any person committing the acts thereby prohibited with intent to prevent violations of this sub-title or to procure the punishment of offenses against the same."

STATEMENT

The Petitioner has a book store in Baltimore City, Maryland, wherein he sells books, magazines and pictures to the general public. He does not allow anyone in the store under the age of twenty-one (21) years.

The Petitioner was indicted by the Grand Jury of Baltimore City in a two count Indictment based on the provisions of Article 27, Section 418, Code of Public General Laws of Maryland (1957 Edition), which Section is set forth above.

The first count of the Indictment charged the Petitioner with having in his possession "with intent to sell, certain lewd, obscene and indecent pictures of certain male persons whose names are to the jurors aforesaid unknown, * * *". The second count of the Indictment charged the

Petitioner "unlawfully did sell certain lewd, obscene and indecent pictures, of certain male persons whose names to the jurors aforesaid are unknown, * * *".

The case was tried before the Court without a Jury. The pictures were introduced into evidence, and several witnesses were called, including Lincoln Johnson, who holds a PHD degree and is a Professor in the History of Art Department at Goucher College, in Towson, Maryland; Audrey Bodine who is a Photographic Director of the Sunday Sun and a well known photographer in Baltimore, Maryland; Robert F. Forth who is the Vice-President and Dean of the Maryland Institute, a well known Art School in the Baltimore Metropolitan area; and Barbara Gold, who writes an Art Column for the Sunday Sun and is considered an Art Critic. All of these witnesses testified to the fact that the photographs or pictures had no artistic merit or redeeming social value. However, all of the witnesses testified that they did not believe that the pictures would appeal to the prurient interest in sex of the average person although all of the witnesses did feel that they were repulsed by what they saw and further that they felt the pictures would be repulsive to all who viewed them.

At the end of the State's case Motions for Directed Verdict of Acquittal were made and denied, and the Motions were renewed after the defendant rested his case, and again denied. The Petitioner was convicted and sentenced to serve one year in jail and pay a fine of Two Hundred ($200.00) dollars, being the maximum penalty by the statute.

Thereafter an Appeal was taken to the Court of Special Appeals of Maryland which sustained the lower Court, and subsequently a Petition for Writ of Certiorari to the Court

of Appeals of Maryland, the highest Court of the State, was filed and the same denied.

REASON FOR GRANTING THE WRIT

IS THE STATUTE UNDER WHICH THE DEFENDANT WAS CONVICTED, CONSTITUTIONAL?

The First Amendment to the Constitution of the United States, guarantees freedom of speech and press to the individual citizen as against the Federal Government. By the adoption of the Fourteenth Amendment to the Constitution, and several interpretations made by this Court, it has been held that the Fourteenth Amendment to the Constitution cannot be abridged by the State Government. See *Gitlow v. New York*, 268 U.S. 625 (1925); *Fiske v. Kansas*, 274 U.S. 380 (1927) and *Near v. Minnesota*, 283 U.S. 697.

The Statute under which the Petitioner herein was convicted, Article 27, Section 418 of the Annotated Code of Maryland, (1957 Edition) is set out in full on page 2 under Constitutional Provisions and Statutes.

The question then arises whether or not the State has the right under the First and Fourteenth Amendments to the Constitution to pass any laws that abridge the right of free speech and press. It is your Petitioner's contention that the State has no right under the Constitution of the United States to pass any laws regulating the freedom of speech or press, that would fall outside of the "clear and present danger doctrine" and further, that even under the clear and present danger doctrine, the State must show that individuals will be aroused to riot or that the speaker or literature is advocating anarchy. It is your Petitioner's contention that under no other circumstances may the State legally adopt any law that will suppress freedom of speech or press, including laws pertaining to obscenity.

This contention is not without merit, for in the case of *Redrup v. State of New York, Austin v. State of Kentucky,* and *Gent, et al v. State of Arkansas,* all consolidated in the October Term, 1966 of this Honorable Court, the decision being rendered on May 8, 1967, and reported in 87 S. Ct. 144, it was said in dictum that:

> "Two members of the Court have consistently adhered to the view that the State is utterly without power to suppress, control or punish, the distribution of any writings or pictures upon the grounds of their 'obscenity'. A third has held to the opinion that a State power in this area is now only limited to a distinct and poorly identifiable class of material. Others have subscribed to a not dissimiliar standard, holding that a State may not constitutionally inhibit the distribution of literary material as obscene unless (a) the dominant theme of the material taken as a whole appeals to the period interest in sex; (b) the material is patently offensive because it affronts the contemporary standards relating to the description or the representation of sexual matters; and (c) the material is utterly without redeeming social value, emphasizing that the 'three elements must coalesce' and no such material can 'be proscribed unless it is found to be utterly without redeeming social value' ".

It is contended that the power of the State to abridge freedom of speech and of the press is the exception rather than the rule, and that the Legislature may not under the guise of police power, arbitrarily or unnecessarily interfere with the freedom of speech and of press. No contention is made that the State may not, under the police powers, punish an abuse of free speech or press by those who would fall within the realm of the clear and present danger doctrine for inciting to riot or advocating anarchy, but certainly, there can be no clear present danger in the sale of pictures be they obscene or not. The only basis upon

which this statute may stand constitutionally, is a finding by this Court that the control of "obscenity" is within the police power of the State, even though the same may abridge the constitutional guarantees of the First and Fourteenth Amendments.

There have been many cases tried on the obscenity statutes as enacted by the many Legislatures of the various States. In general, all of the Courts have said that the statutes can only be valid if there is a clear and present danger to the general public. Certainly the sale of pictures cannot be considered as presenting a clear and present danger to the public morals.

All persons of any stature today realize that it is impossible to regulate public morals by law. Although many acts are considered illegal because of statute, in many instances the Legislature realizes the insignificance of the crime by the penalty imposed. Thus in Maryland, the crime of adultery as set forth in Article 27, Section 4 of the Annotated Code of Maryland, provides for a fine of Ten Dollars ($10.00) upon conviction. The tendency today has been to liberalize thinking along the lines of sexual behavior, as in England there has been a long study and an eventual repeal of laws that made homosexuality a crime.

It is your Petitioner's belief that the State should not be permitted to control what pictures or photographs an individual may view. For it is preposterous to say that the paintings of the great masters hanging in the many Art Galleries and Museums of the world, which depict nudes in various forms and poses are not obscene while a photograph of a nude is obscene. What constitutes obscenity is in the mind of the beholder, not the object per se.

It is respectfully submitted that the statute under which the Petitioner herein was convicted is unconstitutional,

in that it abridges the right of freedom of speech and press as guaranteed in the Constitution of the United States.

ARE THE PHOTOGRAPHS OR PICTURES IN QUESTION, OBSCENE?

In the last few years, this Court has reviewed many convictions of persons charged with various degrees of selling pornographic literature. In the case of *Roth v. U.S.*, 354 U.S. 476 (1957), this Court laid down specific guide lines in determining whether certain matter was in fact obscene under the law. In the later case of *Manual Enterprises, Inc. v. Day*, 370 U.S. 478, 82 S. Ct. 1432 (1962), a case involving the Post Office's refusal to permit certain magazines consisting largely of photographs of nude or near nude male models to be sent through the mails, this Court, on page 489, said:

> "At least one important State Court and some authoritated commentators have considered Roth in subsequent cases to indicate that only 'hard core' pornography can constitutionally be reached under this or similar state obscenity statutes, (cases cited)".

Your Petitioner believes, that if the State can constitutionally pass a statute to control "pornographic literature", that this may only be done for "hard core" pornography. Your Petitioner does not believe that the photographs in question here constitute hard core pornography, and therefore on this basis his conviction must be reversed.

CONCLUSION

In summing up the two questions raised by your Petitioner, it is his contention that:

1. The State has no right to pass a law which will limit freedom of speech or press in matters pertaining to obscenity.

2. That the pictures or photographs upon which your Petitioner was convicted are not obscene or pornographic according to the guide lines as set up by this Honorable Court.

Your Petitioner respectfully submits that the Court of Special Appeals of Maryland has erroneously sustained the determination of guilt of your Petitioner, which determination has been affirmed by the Court of Appeals of Maryland, by its refusal to review the conviction on Certiorari, and thus, has denied your Petitioner his constitutional rights.

WHEREFORE, your Petitioner prays that this Petition for Writ of Certiorari be granted; that a review of the cause herein be made by this Honorable Court, and that the judgment of the Special Court of Appeals of Maryland and the Court of Appeals of Maryland be reversed as to the issues before this Honorable Court, and for such other relief in this cause as this Honorable Court shall deem just.

Respectfully submitted,

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